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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ALETA ROSE GOODWIN et al.,

Plaintiffs,

vs.

EXECUTIVE TRUSTEE SERVICES, LLC et
al.,

Defendants.

Case No. 3:09-cv-306-ECR-VPC

**MOTION OF DEFENDANT WELLS
FARGO BANK, N.A. TO VACATE
NON-FORECLOSURE
STIPULATIONS**

At the start of this litigation, and to avoid the costs and expenses associated with forthcoming preliminary injunction hearings, Wells Fargo Bank, N.A. ("Wells Fargo") entered into stipulations with Plaintiffs Brian Jones, George Moreno and Heather Monahan, and Signe Stehman, in which it agreed not to foreclose on the properties securing their loans. In return, Plaintiffs agreed to make payments of property taxes and insurance in connection with the loans. Since that time, Wells Fargo has lived up to its end of the bargain, but Plaintiffs have not—they refused to make the tax and insurance payments as required by the stipulations, and Wells Fargo had to incur those expenses (approximately \$12,000) to protect the collateral securing the loans.

1 Moreover, Wells Fargo contacted Plaintiffs to inform them of the violations and to ask them to
2 comply with their agreements; Plaintiffs simply ignored the letters. And, the situation is
3 compounded because these Plaintiffs all stopped making their required loan payments long ago.
4 They now owe a total of *over \$236,000* on just these three loans, an amount growing each month.

5 Plaintiffs' actions not only violate their binding obligations under the stipulations, but also
6 are highly unfair and inequitable. Their uncured material breach requires that the Court vacate
7 the stipulations, and place the parties back in the position they occupied before the stipulations
8 were entered into.

9 **BACKGROUND**

10 **I. The Parties' Agreements.**

11 Plaintiffs filed this lawsuit on June 9, 2009. That same date, eleven plaintiffs filed a
12 motion seeking to prohibit foreclosure and eviction activity with respect to properties securing
13 their loans. "Motion for Temporary Restraining Order and Preliminary Injunction" (June 9,
14 2009) (Dkt. 2). On June 10, 2009, the Court granted a temporary restraining order, and scheduled
15 a hearing on Plaintiffs' motion for preliminary injunction for June 22, 2009. "Temporary
16 Restraining Order" (June 10, 2009) (Dkt. No. 5).

17 To avoid the costs and expenses associated with a hearing, on June 19, 2009, Wells Fargo
18 entered into a stipulation with Plaintiff Jones in which it agreed not to engage in foreclosure
19 activity with respect to the properties securing his loan. "Stipulation Between Plaintiffs and
20 Defendants Regarding Preliminary Injunction Hearing" (June 19, 2009) (Dkt. No. 26) ("June 19
21 Stipulation") at ¶ 2.

22 Plaintiff Jones had a reciprocal obligation. Under Paragraph 6, Plaintiff Jones expressly
23 "agree[d] to keep property taxes and insurance current" on his property.

24 A similar situation occurred with respect to Plaintiffs George Moreno and Heather
25 Monahan, and Signe Stehman. They were parties to a motion filed on June 29, 2009, to stop
26 foreclosure and eviction activity. "Motion for Temporary Restraining Order and Preliminary
27 Injunction" (June 29, 2009) (Dkt. No. 59). After a TRO was entered and a hearing scheduled on
28 a preliminary injunction request, the parties entered a stipulation containing substantially similar

1 terms as the June 19 Stipulation, in which Wells Fargo agreed not to foreclose, and Plaintiffs
 2 “agree[d] to keep property taxes and insurance current” on their respective properties.
 3 “Stipulation Between Plaintiffs and Defendants Regarding Preliminary Injunction Hearing” (July
 4 16, 2009) (Dkt. No. 118) (“July 16 Stipulation”) at ¶¶ 2, 6.

5 The Court approved both the June 19 and July 16 Stipulations. Minute Order of the Court
 6 (June 22, 2009) (Dkt. No. 28); Minutes of Court (July 16, 2009) (Dkt. No. 123).

7 **II. The Termination Provisions.**

8 The Stipulations were not open-ended. To the contrary, the parties agreed that their
 9 obligations would last only until (1) trial on the merits, (2) resolution of Plaintiffs’ claims that
 10 could affect Defendants’ right to foreclose; or (3) “issuance of a superseding court order with
 11 respect to this Stipulation.” June 19 Stipulation ¶ 9; July 16 Stipulation ¶ 9.

12 Moreover, both Stipulations provided that the parties’ agreements could be terminated
 13 unilaterally with appropriate written notice to the other:

14 Notwithstanding the foregoing paragraphs, any party to this
 15 Stipulation may request to be relieved from the terms of this
 16 Stipulation by providing ninety (90) days written notice to the
 17 other corresponding party. If the non-requesting party does not
 agree, the requesting party may file a motion with the Court
 seeking to vacate the Stipulation.

18 June 19 Stipulation ¶ 9; July 16 Stipulation ¶ 9.

19 **III. Plaintiffs Ignore Their Payment Obligations, And Refuse To Cure Their Breaches.**

20 Plaintiffs violated the Stipulations and refused a chance to correct the breaches.

21 In the approximately nine months that the parties entered into the Stipulations, Plaintiffs
 22 have refused to pay required property taxes and insurance. Declaration of Laurie Vanden
 23 Branden (“Branden Dec.”), attached hereto as Exhibit 1, at ¶¶ 3-5. As a result, to protect the
 24 collateral securing their loans, Wells Fargo has been forced to make the property tax and
 25 insurance payments with respect to each property, in the following amounts:

- 26 • Jones property – \$3,184.44
- 27 • Monahan/Moreno property – \$5,716.14
- 28 • Stehman property – \$3,194.73

1 Branden Dec. ¶¶ 3-5.

2 On February 1, 2010, Wells Fargo sent letters to Plaintiffs' counsel which (a) reminded
3 Plaintiffs about their obligations under the Stipulations to pay property taxes and insurance; (2)
4 informed Plaintiffs of their failure to meet those obligations; and (3) stated the amounts required
5 to cure the breach. *See* Exhibit 2 hereto. The letters also informed Plaintiffs that, if they believed
6 they had complied with the Stipulations, they should provide information to Wells Fargo showing
7 their adherence; alternatively, Plaintiffs could indicate if they wished to make up the deficiencies
8 and abide by the Stipulations in the future. *Id.* Finally, Wells Fargo indicated that it would
9 exercise all its rights resulting from the breach, including obtaining an order dissolving the
10 Stipulations as provided in the Stipulations themselves. *Id.*

11 Plaintiffs never responded to these letters. Wells Fargo has therefore been forced to
12 continue to make payments of taxes and insurance regarding the subject properties (Branden Dec.
13 ¶¶ 3-5), and it has filed this Motion after expiration of the 90-day notice period set forth in
14 Paragraph 9 of the Stipulations.

15 ARGUMENT

16 The June 19 and July 16 Stipulations between Wells Fargo and Plaintiffs are agreements
17 between the parties governed by contract principles. *Jandy Textiles Corp. v. Atlantic Container*
18 *Line, Ltd.*, 1991 WL 222161, at * 2 (S.D.N.Y. Oct. 22, 1991). One such basic contract principle
19 is that parties must abide by their written agreements. For that reason, courts vacate stipulations
20 when one party has breached a material term of the agreement and failed to cure the breach. *See,*
21 *e.g., Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir.
22 2005) (stipulation vacated where party breached terms of stipulation); *United States v. Espinoza-*
23 *Jiminez*, 159 F. App'x 680, 684 (6th Cir. 2005) (same).

24 The Court should vacate the June 19 and July 16 Stipulations. Plaintiffs ignored their
25 written obligations to pay property taxes and insurance. They also were presented with notice of
26 and an opportunity to explain their breach, or cure the breach and comply with the Stipulations on
27 a going-forward basis. They ignored this opportunity as well. They have simply thumbed their
28 noses at the promises made in the Stipulations.

1 The breaches were significant. Initially, Wells Fargo was forced to incur a monetary loss
2 and make the tax and insurance payments Plaintiffs refused to pay. And, had Wells Fargo not
3 made these payments, Plaintiffs' failures to abide by their obligations could have exposed Wells
4 Fargo to even more significant losses. If hazard insurance was not paid for a property, and the
5 property was destroyed by a fire, Wells Fargo would suffer a near-complete loss of the collateral
6 securing its loan. Similarly, if taxes were not paid, local taxing authorities could place a lien on
7 the property, which would take priority over Wells Fargo's security interest, thus potentially
8 impairing its ability to recover the outstanding balance of the loan.

9 Making the breach all the worse is Plaintiffs' total refusal to pay their loans. Paragraph 8
10 of each Stipulation provides that the parties' agreements "shall not otherwise change or waive the
11 contractual rights" under each of their Notes. Despite their ongoing contractual promises in their
12 Notes to make monthly payments, Plaintiffs Jones, Monahan and Moreno have paid nothing on
13 their loans for nearly two years, and Plaintiff Stehman has gone almost three years without
14 making a payment—in a collective amount of approximately \$236,086.10 as of May 2010.
15 Branden Dec. ¶ 3-5.

16 In short, Plaintiffs are trying to live in their properties indefinitely for free, without even
17 making the tax and insurance payments required under the Stipulations. This circumstance is
18 inequitable and unfair to Wells Fargo, as Judge Jones held in denying a motion for a preliminary
19 injunction to stop foreclosures in a related lawsuit filed by the same attorneys as this one:

20 But the real basis here is that the request for equitable relief is
21 unaccompanied by an equitable offer, no tender or part of the
22 payments, no tender of keeping the payments current, just let them
23 [the lenders] be harmed, Judge It's just inappropriate, and
there's no basis to grant the equitable relief requested.

24 Transcript of Hearing, *Dalton v. Citimortgage, Inc.*, No. 3:09-cv-00534 (Oct. 9, 2009) at pp. 131-
25 32 (attached hereto as Exhibit 3). So too here, because Plaintiffs have violated their binding
26 obligations to Wells Fargo, the Court should vacate the Stipulations to prevent further harm to
27 Wells Fargo and to terminate the current inequitable situation.

28 Plaintiffs also should not be allowed to continue their conduct in the future. Thus, the

1 Court also should order that, if Plaintiffs seek injunctive relief of any kind in the future, they
2 should first pay Wells Fargo all unpaid taxes and insurance as a precondition to seeking such
3 relief.

4 **CONCLUSION**

5 For these reasons, Defendant Wells Fargo Bank, N.A. respectfully requests that the Court
6 grant this Motion, and enter an Order (1) vacating the Stipulations entered on June 19 and July
7 16, 2009; and (2) ordering Plaintiffs to pay to Wells Fargo all unpaid tax and insurance payments
8 as a precondition to seeking injunctive relief in the future.

9 Dated: May 19, 2010

10 Respectfully submitted,

11
12 /s/ Cynthia Alexander

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2010, I electronically transmitted the above document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter, all counsel being registered to receive Electronic Filing.

/s/ Gaylene Kim
an employee of Snell & Wilmer L.L.P.